DOCKET

(1)

(SHOW) PROCEEDINGS AND ORDERS DATE: 050385

CASE NBR 84-1-05850 CSY
SHORT TITLE Koon, Paul F. DOCKETED: Nov 30 1984
VERSUS South Carolina

Date	Proceedings and Orders
Nov 30 1984	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jan 2 1985	Brief of respondent South Carolina in opposition filed.
Jan 3 1985	DISTRIBUTED. January 18, 1985
Feb 1 1985	REDISTRIBUTED. February 15, 1985
Feb 19 1985	REDISTRIBUTED. February 22, 1985
Feb 22 1985	Record reqeusted (TM)
Mar 7 1985	Record filed.
Mar 7 1985	Certified original record, 3 volumes, received.
Mar 11 1985	REDISTRIBUTED. March 15, 1985
Mar 18 1985	REDISTRIBUTED. March 22, 1985
Mar 25 1985	REDISTRIBUTED. March 29, 1985
Apr 5 1985	REDISTRIBUTED. April 12, 1985
Apr 15 1985	The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice

CONTINUE (

PROCEEDINGS AND ORDERS DATE: 050385

CASE NBR 84-1-05850 CSY
SHORT TITLE Koon, Paul F. DOCKETED: Nov 30 1984
VERSUS South Carolina

Date	Proceedings and Orders
Apr 15 1985	The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.)

****

PETITION FOR WRIT OF CERTIORARI

RECEIVED
NOV 30 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

(3)

No. 84-5850

PAUL F. KOON

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

DAVID I. BRUCK
Attorney at Law

1711 Pickens Street
Columbia, S.C. 29201.
(803) 779-8080

ATTORNEY FOR PETITIONER

50pp

QUESTIONS PRESENTED

I.

DOES LOCKETT V. OHIO REQUIRE CONSIDERATION OF COMPETENT EVIDENCE REGARDING A CAPITAL DEFENDANT'S PRIOR GOOD CONDUCT AND LIKELY FUTURE GOOD CONDUCT IN PRISON, WHEN SUCH EVIDENCE IS OFFERED AS A BASIS FOR A SENTENCE OF LESS THAN DEATH?

II.

WHEN A STATE COURT FINDS THAT COMPETENT AND RELEVANT EVIDENCE HAS BEEN EXCLUDED IN VIOLATION OF LOCKETT, MAY THE DEATH SENTENCE NEVERTHELESS BE CARRIED OUT ON THE GROUNDS THAT THE VIOLATION WAS "NOT REVERSIBLE ERROR," AND WITHOUT COMPLIANCE WITH THE HARMLESS ERROR DOCTRINE OF CHAPMAN V. CALIFORNIA?

III.

MAY THE ERRONEOUS EXCLUSION OF AN ENTIRE CATEGORY OF RELEVANT MITIGATING EVIDENCE EVER BE DISREGARDED AS HARMLESS BEYOND A REASONABLE DOUBT?

IV.

WERE THE LOCKETT VIOLATIONS IN THIS CASE HARMLESS?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-_____

PAUL F. KOON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

Petitioner Paul F. Koon prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of South Carolina is as yet unreported. The slip opinion, State v. Koon, Opinion No. 22075 (S.C., April 3, 1984), is reproduced in the Appendix to this petition at A-12 to A-14. The per curiam order of the Supreme Court of South Carolina dated October 1, 1984, denying petitioner's timely petition for rehearing is unreported, and is reproduced infra at A-18.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on April 3, 1984. A timely petition for rehearing was denied on October 1, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the Constitution of the United States, which provides in pertinent part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

It further involves the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> "[N]or shall any state deprive any person of life . . . without due process of law . . ."

2. This case also involves S.C. Code §§16-3-20 et seq. (1983 Cum. Supp), which statutory provisions are set forth in the Appendix to this petition at A-

STATEMENT OF THE CASE

1. The First Appeal.

The petitioner Paul F. Koon was tried and convicted of murder and kidnapping and sentenced to death in a South Carolina state court in 1981. At his sentencing hearing before the trial jury, the trial judge excluded as "irrelevant" competent psychiatric testimony to the effect that appellant would in all likelihood make a good institutional adjustment if sentenced to prison, and that he would not pose a danger of violence in a prison environment. On appeal to the South Carolina Supreme Court, petitioner assigned the exclusion of this psychiatric testimony as federal constitutional error. The state supreme court rejected petitioner's constitutional claim in the following discussion:

> Appellant next alleges that the trial court erred by excluding certain psychiatric evidence concerning his future adaptability to jail. We disagree. The penalty phase of a capital murder trial is concerned with the existence or nonexistence of mitigating or aggravating circumstances, not the convicted murderer's adaptability to prison life. The jury is concerned with the circumstances of the crime and the characteristics of the individual defendant as they bear logical relevance to the crime. In Lockett v. Ohio, cited as controlling in Eddings v. Oklahoma, the United States Supreme Court retained the court's traditional authority to exclude irrelevant evidence which did not bear on a defendant's character, prior record, or the circumstances of his offense. We conclude that the evidence of appellant's future conformity to prison life was properly excluded as irrelevant.

State v. Koon, 278 S.C. 528, 298 S.E.2d 769, 774 (1982) (citations

omitted). However, the state supreme court vacated petitioner's death sentence due to improper prosecutorial argument, and remanded his case to the trial court for a new sentencing hearing.

2. Exclusion of Petitioner's Record of Good Behavior in Prison.

By the time that petitioner's resentencing hearing began in February, 1983, petitioner had been in custody for nearly two-and-a-half years. He had spent the majority of this period in South Carolina's Central Correctional Institution awaiting a determination of the appeal of his original conviction and death sentence. Since the prison officials who had had daily contact with him during this period were the only witnesses in a position to attest to his record and character during the most recent years of petitioner's life, and since his record in and adaptation to prison during this period had been good, petitioner intended to call as mitigation witnesses two officers who had supervised him at CCI during the period of his incarceration there. In addition, he intended to call as mitigation witnesses two jailers from the county jail who could attest to his good behavior during the months between October, 1980 and June, 1981, while he had been awaiting his original trial.

Prior to the beginning of petitioner's case, however, and in apparent reliance on the state supreme court's decision in his appeal, the prosecutor made the following motion in limine:

> MR. HARTE [prosecuting attorney]: Your Honor, another matter we need to take up prior to the jury being brought in, I noticed there are two people who were in court yesterday who are jailers. I think they are still jailers, at least they were when Mr. Koon was in the Aiken County jail before. And I think that the sole purpose of their testimony by the defense is to show that he is a good inmate. The Supreme Court in their ruling in this case stated that evidence was irrelevant as to mitigating or aggravating circumstances and should not be permitted. We would ask that counsel be instructed that those witnesses should not be called for that purpose.

Tr. 922, line 22 to 923, line 7. There ensued a discussion between defense counsel and the trial judge during which counsel stressed that the testimony of the prison and jail witnesses was being offered as mitigating evidence of his past record of good conduct during the two-and-a-half most recent years of his life. Defense

counsel advised the court that they had instructed these witnesses to confine their testimony to what they had personally observed of petitioner's behavior. Nevertheless, the trial judge ruled that petitioner's exemplary conduct in prison was not a characteristic which bore "logical relevancy to the crime" of murder, and that the state supreme court's opinion in Koon I "direct[s] me to exclude [the officers'] testimony." Tr. 923-927. Following the testimony of petitioner's other mitigation witnesses, defense counsel reiterated that but for the trial court's ruling, petitioner would have called two correctional officers from the Central Correctional Institution and two guards from the Aiken County jail, and that the testimony of these witnesses would have been to the effect that petitioner had been a model prisoner while incarcerated in each of these institutions.[1] The trial judge indicated that he understood petitioner's proffer, but adhered to his prior ruling excluding the testimony. Tr. 1061-1062.

3. Limitation of Favorable Psychiatric Prediction Testimony.

In addition to the testimony of the prison and jail officials, which was excluded in its entirety, the trial judge also applied the state supreme court's ruling in Koon I to limit the testimony of two psychiatric witnesses who would have predicted that petitioner would have been nonviolent and cooperative as a prison inmate in the future were he to receive a sentence of imprisonment. Immediately after the judge's ruling excluding all evidence of petitioner's exemplary prison record, defense counsel made the following proffer:

> We would like to put on the record that when we present our psychiatrist[s] we are prepared and would proffer testimony as to [petitioner's] extreme adaptability to [a] prison environment both now and in the future. From what they will say about him in the future, we certainly would consider that to be mitigating and extenuating and a circumstance that this jury would want to listen to, that this man could be a model prisoner. And it is the psychiatric opinion that he would have no substantial likelihood of any

---

[1]Similar testimony from the two Aiken County jailers had been presented at appellant's original sentencing hearing. State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982), Transcript of Record at 1584-1590.

difficulty in a prison environment. . .

Tr. 927. This testimony was excluded by the trial judge on the authority of State v. Koon. Tr. 928.

The trial judge did permit the defense to call as mitigation witnesses two psychiatrists, one of whom--Dr. Everett C. Kugler--had examined petitioner during the period between his arrest in October, 1980, and his first trial in June, 1981, and again immediately prior to his resentencing hearing in February, 1983. Dr. Kugler testified that petitioner suffered from a schizoid personality disorder, which he characterized as a rather severe mental illness. In the course of describing this mental disorder, and despite the trial judge's ruling excluding all testimony concerning petitioner's adaptability to prison, Dr. Kugler indicated that persons suffering from schizotypal personality disorder "do very well if they are in a structured environment such as a jail, this kind of thing, where they are pretty much told what to do from morning to night." Tr. 1018. He later amplified on this, drawing on his observations made during visits at the Aiken County Jail between October, 1980, and June, 1981, by recounting that petitioner changed very little while confined in a small jail cell, and remained happy in such a structured environment. Tr. 1025. Dr. Kugler also testified, however, that persons suffering from schizoid personality disorder are often unable to express their emotions, "[a]nd if they do express them, they often come bubbling out . . . be it tears or anger or anything else." Tr. 1018. He went on to describe petitioner as a person who, while not legally insane, nevertheless would not have committed murder but for his mental illness. Tr. 1023-1024.

On cross-examination, the prosecution attempted to discredit Dr. Kugler's testimony by suggesting that he was partisan and emotionally involved in petitioner's defense, Tr. 1027, that he was credulous in assessing petitioner's account of the crime, 1029-1037, that he had failed to explore important factual issues with petitioner during the course of the psychiatric evaluation, Tr. 1039-1043, 1049-1050, and that petitioner was in reality

a "walking time bomb" who would be likely to commit similar crimes in the future. Tr. 1051. In response to this last suggestion, Dr. Kugler stated that he doubted that petitioner would commit such a crime "in a controlled environment." Tr. 1051.

Following Dr. Kugler's testimony, defense counsel stated outside the presence of the jury that the defense had intended to make the doctor's opinion concerning petitioner's adaptability to prison "a large part of our case" in mitigation, and that but for the trial judge's ruling excluding this evidence, the witness would have elaborated far beyond "the bare statement that [petitioner] did well in a controlled environment, that is the jail." Tr. 1062. Counsel elaborated on this proffer by stating that Dr. Kugler's testimony would have been similar to that of Dr. Pattison, the psychiatrist whose prediction concerning petitioner's favorable prognosis in a prison environment was excluded at petitioner's first trial. The excluded testimony of Dr. Pattison to which defense counsel referred was the following:

> Q. You have observed Paul in his prison environment--his jail environment. Do you have an opinion as to his ability to adapt to a long term institutional environment?
>
> A. Yes. Both from the records and from observing him in the jail and from talking with him it is, I think, quite clear in my professional opinion that he adapts very well to an institutional environment. As a matter of fact, in my professional judgment, in an institutional environment he has usually performed at probably his highest levels of function during his adult life, in as much as that environment is supportive, protective and has a relatively low level of stress compared to life in the outside world. Therefore, in this case I would be willing to risk a professional prediction in that I would predict that he would make an overall excellent institutional adjustment on a long term basis. . .
>
> Q. Do you think Paul would be a violent person in an institutionalized environment?
>
> A. Again, in my professional opinion I feel confident in a reasonable frame to conclude that he would not be violent or dangerous within a custodial institution. The basis for my opinion is his past record within the custodial environment, his ability to conform within that environment, not only to maximum seclusion, but also conforming to the rules and regulations when he was under minimal supervision. Furthermore, his past history and his present state suggests that he performs interpersonally much better with men. That his major provocations of explosive and assaultive behavior is with women rather than with men. Therefore, I conclude that he would be a very good risk for good adjustment in an institution and a very low risk

> for assaultive or violent behavior in an institutional setting.
>
> Q. He could be, in your opinion, could he be a contributive [sic] member to a prison institution?
>
> A. Again, for the same reasons, I would say yes, in my professional opinion.

Statement, Tr. ii; State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982), Transcript of Record at 2277-2280. After making this proffer detailing the testimony which the trial judge was excluding, petitioner rested his case in mitigation.

Following closing arguments to the jury, the prosecutor complained to the trial court that defense counsel had argued to the jury concerning petitioner's future adaptability to prison in violation of the court's ruling. Tr. 1093-1094.[2] In response, petitioner's attorney stated that he had been prepared to present a more lengthy jury argument concerning petitioner's probable future good conduct in prison, based on the favorable prognosis of his psychiatric witnesses, and that he had not done so in obedience to the trial court's ruling excluding that subject from the jury's consideration. Tr. 1099.

After some five-and-a-half hours of deliberations spread over two days, the jury sentenced petitioner to death. Tr. 1114-1117.

4. The Second Appeal: The Psychiatric Testimony

On appeal to the South Carolina Supreme Court, petitioner assigned as federal constitutional error both the exclusion of all testimony concerning his good prison record, and the

---

[2]The argument to which the prosecutor objected was the following:

> Look at Paul. You saw him. You heard about him. Ninety-nine+ percent of the time, he is a good man. It is not an issue. But if you believe in any kind of upper existence which has a purpose for people here, Paul can serve a purpose. He is the kind of man who, if he were in prison, he can make furniture; he can cook; he can make license plates. If you had a program where you volunteered for experiments, cancer or whatever, Paul is the kind of man who would do that. He is the kind of man who can still contribute in a prison environment.

Tr. 1087-1088.

severe limitations that had been placed on Dr. Kugler's testimony concerning the likelihood of his future good conduct should he be sentenced to life imprisonment. Exceptions 3 and 4, Tr. 1193-1194. Because the second of these exceptions called into question the correctness of the state supreme court's prior ruling in State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982) (hereafter referred to as Koon I), petitioner was obligated under Rule 8, §10 of the Rules of the South Carolina Supreme Court to request leave of the court to argue that Koon I should be modified or overruled

> to the extent that this decision upholds against Eighth Amendment challenge the exclusion of competent psychiatric testimony to the effect that an individual capital defendant will not pose a danger of violent behavior in a prison environment, and that he could become a contributing member of prison society.

Petition to Argue for Modification or Overruling of Precedent, infra at A-5 to A-6. The petition went on to advise the state supreme court that petitioner was seeking permission to argue,

> as he did in his prior appeal in this Court, that such evidence has logical relevance to the question of whether he should be sentenced to life imprisonment or to death, and that its admission as evidence in mitigation of his punishment is required by Lockett v. Ohio, 438 U.S. 586 (1978) and by Eddings v. Oklahoma, 455 U.S. 104 (1982).

Id. The state supreme court denied this petition, thus precluding petitioner from arguing the merits of his Eighth Amendment challenge to the severe restrictions which the trial judge had placed on the presentation of his psychiatric prediction testimony. A-11 In affirming his death sentence, the state supreme court did not discuss the limitations which the trial judge had placed on petitioner's psychiatric testimony, and adhered to its position in Koon I that a capital defendant's future adaptability to prison is "irrelevant because it does not bear on [his] character, prior record, or the circumstances of his offense." State v. Koon, Opinion No. 22075 (S.C., April 3, 1984) (hereafter cited as Koon II).

5. The Second Appeal: Exclusion of Petitioner's Prison Record

Petitioner was permitted to brief and argue on appeal the

constitutionality of the trial court's exclusion of his entire prison record, which he had sought to introduce through the testimony of the jail and prison officials. In his brief to the South Carolina Supreme Court, petitioner argued that his past record and conduct in prison during the two-and-a-half years between his arrest and his resentencing proceeding was plainly an aspect of his "character or record" within the meaning of Lockett v. Ohio, 438 U.S. 586 (1978), and the trial judge's refusal to permit any part of this record to be presented to the jury violated Lockett's requirement

> that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 604 (emphasis in original).

In its opinion affirming his death sentence, the South Carolina Supreme Court accepted petitioner's argument and held that the excluded testimony of his past good behavior "was clearly an aspect of his character and would be admissible as a mitigating factor." However, the court went on to hold that although the excluded mitigating testimony "would have been relevant, and admissible," petitioner's death sentence should be carried out nevertheless because "the exclusion of the testimony is not reversible error." Koon II, infra at A-13.

The state supreme court arrived at this conclusion on the basis of the fragments of testimony volunteered by Dr. Kugler concerning his observations of petitioner in jail after his arrest. Although Dr. Kugler testified that he had seen petitioner only between October, 1980 and June, 1981, and again during the week before his February, 1983 resentencing hearing, the state court described him as "a psychiatrist who saw Koon from the date of his arrest until the date of his resentencing," and quoted the following excerpts from his testimony:

> [Persons like Paul Koon] do very well if they are in a structured environment such as a jail, this kind of thing, where they are pretty much told what to do from morning to night. . . (Tr. p. 1018).

> [P]aul does very well in a structured environment, such as jail. I saw him in jail for months. He changed very little. He does very well in a structured environment. He does very well if you give him simple work that does not require that he pay a great deal of attention to this because he needs his time for day-dreaming. He is happy if left alone in this world. . . (Tr. p. 1025).

The state supreme court concluded that this testimony from petitioner's retained psychiatrist was "similar" to the testimony of the four jail and prison officials which had been erroneously excluded, and that for this reason the excluded evidence "would have been merely cumulative." Accordingly, the court affirmed petitioner's sentence of death. Koon II, supra.

Petitioner filed a timely petition for rehearing in which he pointed out

1) that contrary to the state supreme court's opinion, Dr. Kugler did not see petitioner at all between his first trial in June, 1981 and the week prior to his resentencing hearing in February, 1983,

2) that the psychiatric testimony quoted in the Court's opinion was part of a series of nonresponsive answers to questions which were posed after a ruling of the trial judge excluding all such testimony, and for this reason petitioner's counsel was not permitted to cite this testimony in his closing argument to the jury, and

3) that the state court's opinion did not reflect compliance with the constitutionally-required standard for assessing the effect of federal constitutional error on the validity of a conviction or sentence, citing Chapman v. California, 386 U.S. 18 (1967). Koon II, supra, Petition for Rehearing, infra at A-15 to A-16.

The petition for rehearing was denied without opinion by the South Carolina Supreme Court on October 1, 1984. On the same date, the court issued a stay of execution for a period of sixty days in order to permit the filing of this petition for a writ of certiorari. Infra, A-18, A-19.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

As discussed in the preceding Statement of the Case, petitioner offered at his resentencing hearing mitigation testimony concerning both his exemplary conduct in prison and his favorable psychiatric prognosis for an nonviolent and successful adaptation to prison life. On appeal to the South Carolina Supreme Court, he argued that the exclusion of both his prison record and his psychiatric evidence of future adaptability violated the Eighth Amendment principle of Lockett v. Ohio, 438 U.S. 586 (1978). Brief of Appellant Paul F. Koon at 7-11, Petition to Argue Against Precedent, infra at A-5 to A-6. The state supreme court denied him permission to brief and argue the admissibility of the psychiatric evidence, and reaffirmed its prior decisions holding such evidence to be "irrelevant . . . because it does not bear on a defendant's character, prior record, or the circumstances of his offense." State v. Koon, Opinion No. 22075 (S.C., April 3, 1984). With respect to the evidence of petitioner's prior good conduct in prison, the state court agreed that the evidence had been erroneously excluded, but held that the error was "not reversible error" due to the admission of other "similar" evidence. Appellant had argued in his reply brief that even if the erroneous exclusion of such evidence in violation of Lockett v. Ohio, 438 U.S. 586 (1978) could be treated as harmless error under some circumstances, the facts of this case did not permit a finding that the error was harmless beyond a reasonable doubt, as required by the harmless constitutional error rule of Chapman v. California, 386 U.S. 18 (1967). Reply Brief of Appellant Paul F. Koon at 5-6. When the state supreme court failed to consider the applicability of Chapman to the Lockett violation which occurred at petitioner's trial, he pointed out the omission in his petition for rehearing, which petition was denied without opinion.

WHY THE WRIT SHOULD BE GRANTED

THIS CASE, LIKE PATTERSON V. SOUTH CAROLINA, PRESENTS THE QUESTION OF WHETHER, AND UNDER WHAT CIRCUMSTANCES, A DEATH SENTENCE MAY BE CARRIED OUT DESPITE ITS HAVING BEEN IMPOSED BY A JURY WHICH WAS NOT PERMITTED TO CONSIDER RELEVANT EVIDENCE IN MITIGATION.

1. The evidentiary restrictions on petitioner's case in mitigation imposed by South Carolina law and applied by the trial judge unquestionably violated Lockett v. Ohio.

In Lockett v. Ohio, 438 U.S. 586 (1978), a plurality of the Court held that

> the sentencer, in all but the rarest kind of capital case, [may] not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id., supra at 604 (emphasis in original); Eddings v. Oklahoma, 455 U.S. 104 (1982). It is manifest that South Carolina law as construed by the state supreme court and applied by the trial judge at petitioner's resentencing violated this Eighth Amendment principle in two important respects.

The first of these Lockett violations was the trial judge's refusal to permit the testimony of petitioner's jail and prison witnesses concerning petitioner's record of good conduct and nonviolent behavior in confinement during his lengthy incarceration between his arrest in October, 1980 and his resentencing trial in February, 1983. For a jury charged with deciding whether a particular defendant should be executed or committed to prison for life, the relevance of his actual conduct in prison over the years immediately preceding his sentencing hearing is self-evident, both for the light which this conduct sheds on his character, and for the bearing which the defendant's prison record may have on the likelihood of his committing violent or unlawful acts in the future. see, gen., Barefoot v. Estelle, ___ U.S. ___, 103 S.Ct. 3383 (1983), California v. Ramos, ___ U.S. ___, 103 S.Ct. 3446 (1983), Jurek v. Texas, 428 U.S. 262 (1976) (opinion of Stewart, Powell and Stevens, JJ.).

The second violation of Lockett occurred in the severe limitations placed by the trial judge and by South Carolina law on petitioner's efforts to present to the sentencing jury a psychiatric evaluation which tended to establish that he could be expected to make an excellent adjustment to a prison environment and would likely pose a small and diminishing risk of further acts of violence. That such psychiatric prediction evidence plays an important role in capital sentencing decisions has been frequently recognized in this Court's cases. Barefoot v. Estelle, ___ U.S. ___, 103 S.Ct. 3383 (1983), Estelle v. Smith, 451 U.S. 454 (1981); and see Eddings v. Oklahoma, 455 U.S. 104, 121 (1982) (Burger, C.J., dissenting). South Carolina law permits psychiatric predictions of capital defendants' likely future dangerousness, State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982), cert. denied, ___ U.S. ___, 103 S.Ct. 3572 (1983); its rejection of psychiatric predictions of a capital defendant's probable nondangerousness in a prison environment is based not on any concern for the reliability of such predictions, cf. Barefoot v. Estelle, ___ U.S. ___, 103 S.Ct. 3383, 3408-3417 (1983) (Blackmun, J., dissenting), People v. Murtishaw, 29 Cal.3d 733, 175 Cal. Rptr. 738, 631 P.2d 446 (1982), but rather on its view that a convicted murderer's likely good conduct in prison is itself irrelevant to the jury's sentencing decision. State v. Koon, 278 S.C. 528, 298 S.E.2d 769, 773-774 (1982), State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627, cert. denied, ___ U.S. ___, 104 S.Ct. 3560 (1984), State v. Chaffee, Opinion No. 22182 (S.C., Nov. 13, 1984). The South Carolina Supreme Court has reached this position on the basis of its reasoning that a capital sentencing jury is concerned with the characteristics of the defendant only "as they bear logical relevance to the crime" for which he has been convicted. Koon I, supra. According to the South Carolina court, a capital defendant's potential for a successful adjustment to life in prison is irrelevant to the determination of his sentence because of "the lack of logical connection between adaptability to confinement and the

specific personality or character traits which were instrumental in leading the defendant to commit the particular crime at issue." State v. Plath, supra, 313 S.E.2d at 627.

What the South Carolina Supreme Court's unduly narrow and crime-focused view of relevancy overlooks, of course, is the possibility that a sentencing jury's perception of whether a convicted murderer would pose an unreasonable risk of further acts of violence if permitted to live in prison might influence its decision to take or spare his life. A convicted murderer's probable future conduct is an entirely proper consideration in any sentencing decision, California v. Ramos, ___ U.S. ___, 103 S.Ct 3446 (1983), and where the jury's choice is between death and life imprisonment, the likelihood of that a particular defendant would prove co-operative and nonviolenet in a prison environment is especially germane. Thus the South Carolina Supreme Court's prohibition of such evidence--at least where the evidence is favorable to the defendant, cf. State v. Woomer, 278 S.C. 468, 299 S.E.2d 317, 319-320 (1982), cert. denied, ___ U.S. ___, 103 S.Ct. 3572 (1983)--cannot be reconciled with the command of the Eighth Amendment that "[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." Jurek v. Texas, 428 U.S. 262, 271 (1976) (opinion of Stewart, Powell and Stevens, JJ.), and see, California v. Ramos, supra, 103 S.Ct at 3453-3454, Barefoot v. Estelle, ___ U.S. ___, 103 S.Ct. 3383, 3396 (1983). In sum, it is obvious that South Carolina's prohibition of psychiatric testimony concerning a capital defendant's probable good conduct in prison violates the Eighth Amendment holdings of this Court. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982).

2. The South Carolina Supreme Court's assessment of the effect of the Lockett errors in this case.

Before turning to the merits of the South Carolina Supreme Court's designation of the Lockett violations which occurred at petitioner's resentencing hearing as "not reversible," it

is important to note that the state court's analysis was controlled by a legal principle--Koon I's prohibition of evidence of a convicted murderer's probable good conduct in prison--which is itself violative of Lockett. For this reason, the South Carolina Supreme Court failed to identify correctly the Lockett errors which actually occurred in this case. While the state supreme court did recognize that petitioner's prison witnesses were erroneously barred from testifying, it reached this conclusion only because it acknowledged that the excluded testimony of petitioner's good record in prison was relevant to show his "character"--which the state court regards as admissible--rather than merely the likelihood of his future good behavior in prison, a subject which the court continues to regard as irrelevant. Koon II, infra at A-13, State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627 (1984); State v. Stewart, ___ S.C. ___, 320 S.E.2d 447, 450 (1984), State v. Patterson, Opinion No. 22168 (S.C., October 10, 1984), (petition for cert. filed, Nov. 30, 1984), State v. Chaffee, Opinion No. 22182 (S.C., Nov. 13, 1984).[3]

For this reason, the state supreme court did not review the weight and nature of all of the evidence which the jury did hear bearing on the likelihood of petitioner's future good conduct in prison before arriving at its conclusion that the erroneous exclusion of the guards' testimony was "not reversible." Rather, the court's analysis began from the unconstitutionally narrow view that the proffered evidence was only admissible to the extent that it bore on petitioner's "character," and then examined the record to see if other evidence tending to prove the same aspect of his character was admitted.

Proceeding in this manner, the state court ignored the following distinctions between the fragmentary evidence which it extracted from the testimony of Dr. Kugler, and the lay and

[3]As noted earlier in this discussion, this rule stems from the South Carolina Supreme Court's view that a capital defendant's future behavior in prison is irrelevant because it is not among the "specific personality or character traits which were instrumental in leading the defendant to commit the particular crime at issue." State v. Plath, supra, 313 S.E.2d at 627.

psychiatric evidence which the trial judge excluded:

(1) Dr. Kugler was a psychiatrist retained and paid by the defense, and was effectively cross-examined by the prosecution to show his bias and commitment to petitioner's cause. By contrast, the jail and prison guards were neutral and detached observers with no reason to be biased on petitioner's behalf.[4]

(2) Dr. Kugler's evaluation of petitioner's adaptation to jail was based only on sporadic observations made at a time (the first eight months of his incarceration in 1980-1981, and again one week before his resentencing hearing) when petitioner knew that he would soon be going on trial for his life. The jail and prison witnesses, by contrast, would have testified on the basis of continuous contact with appellant for virtually every day of the previous two-and-a-half years.

(3) Dr. Kugler's testimony was for the most part in the nature of a medical prognosis concerning petitioner's future behavior: the officers' testimony, by contrast, concerned petitioner's actual past record as a prison inmate over a long period of time, and thus did not depend for its impact on the jury's confidence in the witnesses' ability to predict petitioner's future behavior.

(4) Dr. Kugler's few isolated remarks concerning petitioner's behavior in jail were volunteered somewhat nonresponsively after the trial judge had already forbidden counsel to explore the subject with the

[4]Indeed, the jury might reasonably have accorded special weight to the prison officers' testimony on the grounds that these witnesses would themselves be responsible for petitioner for many years to come if he was sentenced to life imprisonment. They were, in short, uniquely qualified to express an evaluation of his prison record because it was they who would have to live and work with the consequences of the jury's decision if petitioner was sentenced to life imprisonment, while Dr. Kugler would not.

witness, and defense counsel was unable to argue Dr. Kugler's testimony to the jury in summation.

(5) The comments which Dr. Kugler was able to make concerning petitioner's likely future conduct in prison were far less detailed and persuasive than the testimony which petitioner intended to elicit from the witness, and which would have been elicited but for the trial judge's application of Koon I to exclude the subject from the jury's consideration.[5]

In summary, the excluded testimony would have permitted petitioner to persuade the jury, through the well-grounded and impartial testimony of four law enforcement witnesses and through a carefully-developed psychiatric prognosis, that petitioner could be allowed to live in prison without any undue risk of further acts of violence. What the jury heard instead were a few fragments of a psychiatric evaluation, unsupported by any other evidence and undeveloped by examination or argument of counsel. It was this amalgam of constitutional error which the South Carolina Supreme Court has now held may be overlooked on the grounds that part of the excluded testimony was "cumulative," and the errors were "not reversible."

3. The need for a standard by which to assess "harmlessness" of violations of Lockett v. Ohio.

It is plain from the South Carolina Supreme Court's opinion that that court treated the Lockett violations at petitioner's trial as mere state law evidentiary errors, and neither considered nor applied any federal constitutional standard to its determination of whether the errors could be disregarded as harmless. To the extent that this omission may be attributable to the fact

---

[5]In this connection, the portions of Dr. Kugler's actual testimony quoted by the state supreme court, infra at A-13, should be compared with defense counsel's proffer, based on the deposition of Dr. Pattison prior to petitioner's first trial, reproduced infra at 6-7.

that this Court has not yet expressly considered the interrelation between Lockett and the "harmless constitutional error" doctrine of Chapman v. California, 386 U.S. 18 (1967), petitioner submits that this case provides the Court with an appropriate occasion to consider this important question.

In Chapman v. California, supra, the Court held that, with certain exceptions, constitutional error could be disregarded as harmless so long as the state, as beneficiary of the error, was able "to prove beyond a reasonable doubt that the error complained did not contribute to the verdict obtained." 386 U.S. at 24. However, the Court cautioned that this federal harmless constitutional error rule would not permit courts "to treat as harmless those constitutional errors that 'affect substantial rights' of a party," id. at 23, quoting Fahy v. Connecticut, 375 U.S. 85 (1963). And shortly after Chapman, the Court again stressed that "[w]e do not suggest that, if evidence bearing on all the ingredients of the crime is tendered, the use of cumulative evidence, though tainted, is harmless error." Harrington v. California, 395 U.S. 250, 254 (1969).

As an initial matter, it is plain that the importance of the objectives which the rule of Lockett v. Ohio seeks to safeguard requires that no lesser standard than that of Chapman v. California be applied to assess whether actual Lockett violations may be disregarded as harmless. As this Court has held on many occasions since Gregg v. Georgia, 428 U.S. 153 (1976), the severity and irrevocability of death as punishment creates a special need for particular reliability in the decision to impose a death sentence in a particular case, Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell and Stevens, JJ.), and renders unconstitutional any procedure which creates an unnecessary risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. 586, 605 (1978). Given the gravity of the sentencing decision and the "vital importance to the defendant and to the community" that capital sentencing decisions

"be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 356, 358 (1977), it is plain that any standard of appellate review less demanding than that prescribed by Chapman will be inadequate to the task of "ensur[ing] that the death penalty was not erroneously imposed" as a consequence of constitutional error. Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring).

Petitioner recognizes that in considering the degree of prejudice required to warrant reversal from a denial of effective assistance of counsel, the Court has held that the evidence unjustifiably omitted from the sentencer's consideration must be such as to produce a "reasonable likelihood" that the result would have been different. Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052 (1984). The Court has never applied this Sixth Amendment prejudice requirement, however, to cases in which evidence was withheld from consideration in violation of the Eighth Amendment, whether the violation occurred as a result of state law, Lockett v. Ohio, 438 U.S. 586 (1978), or of trial error. Eddings v. Oklahoma, 455 U.S. 104 (1982).

On the contrary, where any violation of the sentencing authority's "constitutional obligation to evaluate the unique circumstances of the individual defendant" has occurred, Spaziano v. Florida, ___ U.S. ___, 104 S.Ct. 3154, 3162 (1984), the Court has declined to place any burden to demonstrate prejudice upon the defendant whose rights have been violated. Lockett, supra, Eddings, supra. Indeed, the Court has suggested in other contexts that where constitutional error has actually affected the deliberative process in a capital sentencing proceeding, reversal must follow automatically. For example, in Gardner v. Florida, 430 U.S. 356 (1977), in which an undisclosed presentence report had been considered by the sentencing judge in violation of the Due Process Clause, the Court rejected the prosecution's suggestion that the constitutional error could be cured by remanding the case to the state supreme court for appellate reconsideration of the death sentence after the report had been disclosed.

Noting that timely disclosure in the trial court might have produced a defense explanation or argument which in turn could have led the sentencing judge to a different sentencing decision, the Court held that the constitutional error could only be cured by an entirely new sentencing determination. 430 U.S. at 362. Similarly, in Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733 (1983), the Court stated in dictum that had even one of several aggravating circumstances considered by the jury been constitutionally invalid, in the sense that the conduct thus considered as aggravating was constitutionally protected or else "totally irrelevant to the sentencing process, . . . due process of law would require that the jury's decision to impose death be set aside." 103 S.Ct. at 2747.[6]

In view of the nature of the Eighth Amendment interests protected by the rule of Lockett v. Ohio, then, it is clear that if any violations of that rule may be tolerated at all, they must at the very least satisfy the rigorous scrutiny mandated by Chapman. Thus the central question presented by this case is whether Chapman may be applied to Lockett violations.

In answering this question, it is essential to keep in mind the fundamental difference between the nature of the jury's decision with respect to a criminal defendant's guilt or innocence and its task of determining whether or not to impose a sentence of death. Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 2754-2755 (1983) (Rehnquist, J., concurring). In any criminal trial, the jury is required to convict a defendant once it finds that the evidence has demonstrated his guilt beyond a reasonable doubt. It is for this reason that an examination of the record

---

[6]Concurring separately in Zant v. Stephens, Justice White took issue with the majority's suggestion that a jury's consideration of a constitutionally impermissible aggravating circumstance would necessarily invalidate any ensuing death sentence: Justice White maintained that even in this situation, "there would be room for the application of the harmless error rule." 103 S.Ct. at 2751. For present purposes, what should be stressed is simply that no member of the Court has suggested that any standard less exacting than the harmless error rule of Chapman v. California may be applied to review of a death sentence infected with constitutional error.

will usually reveal whether "there is a reasonable possibility that the [constitutional error] contributed to the verdict." Schneble v. Florida, 405 U.S. 427, 432 (1972).

By contrast, under South Carolina's death penalty sentencing statutory complex, the discretionary and relatively unstructured nature of the jury's sentencing decision makes such a determination virtually impossible. No quantum of evidence may ever suffice to require a jury to impose a death sentence. Woodson v. North Carolina, 428 U.S. 280 (1976), State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979). South Carolina juries are not required to state their reasons for declining to impose a sentence of death, S.C. Code §16-3-20(C) (1983 Cum. Supp.), and may impose a life sentence on the basis of any aspect of the case which it sees fit to consider. State v. Copeland, 278 S.C. 572, 300 S.E.2d 63, 74 (1982), cert. denied, 460 U.S. 1103 (1983). Like the Georgia sentencing scheme considered in Gregg v. Georgia, 428 U.S. 153 (1976) and Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733 (1983), South Carolina's sentencing procedure does not require the jury to balance aggravating and mitigating factors against one another, State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 629, cert. denied, ___ U.S. ___, 104 S.Ct. 3560 (1984), but consigns the ultimate sentencing decision to the jury's unfettered discretion once one or more statutory aggravating circumstances have been established. The jury's sentencing recommendation is binding upon the trial judge, State v. Shaw, 273 S.C. 194, 255 S.E.2d 799, 802, cert. denied, 444 U.S. 957 (1979), and while the sufficiency of the evidence to support a death sentence is reviewed on appeal by the state supreme court, S.C. Code §16-3-25(C) (1983 Cum. Supp.), that court does not undertake to redetermine or reweigh the factors underlying the jury's sentencing recommendation, so long as that recommendation is supported by any reasonable view of the evidence. See e.g., State v. Adams, 279 S.C. 228, 306 S.E.2d 208, cert. denied, ___ U.S. ___, 104 S.Ct. 558 (1983) ("the jury had ample opportunity to weigh all of the evidence as might relate to mitigating circum-

stances"); State v. Plath, 281 S.C. 1, 313 S.E.2d 619, cert. denied, ___ U.S. ___, 104 S.Ct. 3560 (1984) ("the jury was disposed to and did in fact give every beneficial consideration to which these appellants were entitled").

Thus, because the jury "is free to consider a myriad of factors to determine whether death is the appropriate punishment," California v. Ramos, ___ U.S. ___, 103 S.Ct. 3446, 3456 (1983), any attempt to identify whether constitutional error in the exclusion of relevant mitigating evidence from a capital sentencing proceeding may have contributed to the sentencing verdict is fraught with insurmountable difficulties. Other states have implicitly recognized the virtual impossibility of determining the effect of such error by reversing death sentences so infected without consideration of prejudice. See, e.g., Cobb v. State, 244 Ga. 344, 260 S.E.2d 60, 69 (1979) (exclusion of testimony of defendant's wife was reversible error even though evidence was somewhat cumulative, "because of the unlimited and undefined nature of mitigating evidence"); Romine v. State, 251 Ga. 208, 305 S.E.2d 93, 100-102 (1983); Simmons v. State, 491 So.2d 316, 320 (Fla. 1982) (exclusion of psychiatric evaluation of defendant's capacity for rehabilitation); Miller v. State, 332 So.2d 65 (Fla. 1976) (denial of continuance to permit psychiatric testimony in mitigation). While these decisions appear to rest on state law, they accurately reflect the difficulty of determining whether the jury's sentencing decision would necessarily have been the same had all relevant mitigating evidence been considered.

This is not to say that any exclusion of mitigating evidence must necessarily trigger reversal under Lockett. Obviously, the federal constitution does not limit the authority of state trial courts to exclude evidence which is truly cumulative, in the sense that it duplicates other evidence of the same kind proving the same point. Purcell Envelope Co. v. United States, 48 Ct.Cl. 66, 73 (1913); McCabe v. Saxon, 184 S.C. 158, 191 S.E. 905 (1937). Thus, for example, if the trial court had admitted the testimony of the four jail and prison officers

proffered by petitioner, Lockett would not have been violated by the exclusion of the identical testimony of a fifth or a sixth such witness. Cobb v. State, 244 Ga. 344, 260 S.E.2d 60, 71 (1979) (Lockett and state law do "not imply. . . that the judge, in his discretion and inherent power to control the progress of trials, cannot limit the introduction of an endless quantity of cumulative testimony . . ."); and see Brooks v. Francis, 716 F.2d 780, 791-792 (11th Cir. 1983) (no Lockett violations where mitigation witnesses were ultimately permitted to give the testimony for which they were called, despite frequent objections by prosecution).

These elementary principles of trial procedure, however, have nothing to do with harmless error, for where only genuinely "cumulative" testimony is excluded, the trial court has not committed any error at all. The question presented by this case is entirely different. Here, an entire category of witnesses--the prison officials who were petitioner's only daily human contacts other than his fellow-inmates over more than two years prior to his resentencing--were erroneously excluded. In addition, competent and highly relevant psychiatric testimony bearing on the likelihood of petitioner's future good conduct was severely limited, and petitioner's counsel was prevented from arguing the evidence to the jury. No other comparable evidence was presented to or considered by the jury. Under such circumstances, it is plain that the South Carolina Supreme Court's designation of the excluded evidence as "cumulative" reflects no more than

its conclusion that the errors committed did not warrant reversal.[7]

The necessity of a thorough exploration of petitioner's past and likely future conduct in prison was peculiarly great in this case because of the nature of that part of petitioner's case in mitigation which the trial judge did permit the jury to consider. Dr. Kugler testified before the jury that at the time of the murder, petitioner was suffering from a mental illness which he classified as an "intermittent explosive disorder." Tr. 1056. Just as this illness was unquestionably an aspect of petitioner's character to be considered in mitigation of his punishment, S.C. Code §16-3-20(C)(b)(2), -(6) and -(7), so was the fact that this illness had not caused petitioner to exhibit violent or antisocial behavior while in prison. But because the sentencing jury was erroneously deprived of the right to consider this latter evidence on the basis of the testimony of jail and prison officials who had had daily contact with petitioner since his arrest, petitioner may well have have been sentenced to death due to the jury's false belief that petitioner's susceptibility to explosive outbursts such as those described by Dr. Kugler was an aspect of his character which rendered him dangerous and unstable in a prison environment. Under these circumstances, it is plain that the excluded evidence of petitioner's good conduct in prison constituted exactly that sort of evidence of "'the character and propensities of the offender'" which must be taken into account "as a constitutionally indispensible part of of the process of inflicting the penalty of death."

---

[7]In characterising the excluded evidence as "cumulative," the state court appears to have departed from its own long-established definition of that term as "additional evidence of the same kind to the same point." McCabe v. Saxon, 184 S.C. 158, 191 S.E. 905, 909 (1937), quoting 20 R.C.L. 297. South Carolina recognizes that if evidence

> is of a different kind, though upon the same issue, it is not cumulative. Nor is evidence cumulative in the legal sense which, while tending to establish the same legal result, does it by proof of a new and distinct fact.

Id., Johnston v. Belk-McKnight Co. of Newberry, 188 S.C. 149, 198 S.E. 395, 399 (1938), and see gen., 10A Words and Phrases "Cumulative Evidence," 410-413 (1968).

Woodson v. North Carolina, 428 U.S. 280, 304 (1976), quoting Pennsylvania ex. rel. Sullivan v. Ashe, 302 U.S. 51, 55 (1937), and the erroneous limitation of that evidence may well have affected the jury's sentencing decision.

The situation here, then, is one in which "the jury was told all the reasons why the death sentence should be imposed but only some of the reasons why it should not." Smith v. Estelle, 445 F. Supp. 647, 659 (N.D. Tex. 1978), aff'd on other grounds, 451 U.S. 454 (1981). Even conceding that Lockett does not require that any particular number of witnesses be called to support each mitigating circumstance proffered by a defendant, the Eighth Amendment is unquestionably violated by the exclusion of whole classes of relevant mitigating evidence. And for the reasons outlined above, in the normal case the effect of such error is by the very nature of the capital sentencing decision impossible to identify and assess with the certainty that Chapman v. California requires.

4. Even if the principle of Chapman v. California were generally applicable to Lockett violations, the violations in this case were manifestly prejudicial and cannot be disregarded as "harmless."

Throughout the foregoing discussion, petitioner has set forth why the erroneous exclusion of his jail and prison record and the severe limitations placed upon his psychiatric prediction testimony was actually prejudicial, and was not cured by the fragments of psychiatric testimony cited by the state supreme court. It remains only to review, as the state court did not, the rest of the evidence considered by the jury.

The state's case in aggravation consisted entirely of its proof of the kidnapping and murder of Valerie Newsome, together with a description of an earlier incident which inconclusively suggested that petitioner may have attempted a similar kidnapping of another young woman at the same Augusta, Georgia shopping center parking lot where Ms. Newsome was later abducted. Tr. 898-905. The state's evidence revealed that petitioner had forced Ms. Newsome into his car and had driven her to a remote

wooded area in South Carolina, where she was either strangled or stabbed. Tr. 853-854. Petitioner denied having committed a sexual assault on the victim, Tr. 853, and autopsy evidence suggested she had not been raped. Tr. 811. After petitioner was arrested for an unrelated offense several weeks later, he confessed to the Newsome murder after receiving the advice of his attorney, and enabled police to locate her remains. Tr. 839-871. The state introduced no evidence that petitioner had any prior criminal record or that he had committed any crimes other than the murder.

In mitigation, petitioner called his mother, his sister and two psychiatrists. Tr. 955-1041. These witnesses portrayed petitioner as a physically huge but mentally and emotionally stunted and disturbed middle-aged man who had lived an isolated and rather childlike existence in his mother's home while fantasizing about normal, loving relationships. Both psychiatric witnesses testified that the crime was a product of petitioner's mental illness. Tr. 971-977; 1016-1024. Petitioner expressed remorse to the jury and expressed remorse for his crime. Tr. 1083-1084. Defense counsel stressed that without petitioner's voluntary assistance to the police, Ms. Newsome's body would never have been discovered and he would probably never have been convicted of murder. Tr. 1076-1079, 1082-1083.

In sum, despite the undeniably shocking and unjustifiable nature of the murder which petitioner admitted committing, there were substantial reasons why the jury might have concluded that a life sentence rather than death was the appropriate punishment. The jury evidently did not find its sentencing decision to be an easy one, since it required more than five hours to reach a unanimous sentencing recommendation, despite the fact that all the testimony in the case had taken less than two days to present.

Under such circumstances, it is impossible to conclude that the jury's sentencing verdict would have necessarily been the same had all the facts been revealed at trial. The record

does not and cannot exclude the possibility that petitioner's death sentence was imposed in part because the jury feared that imposition of a life sentence would provide insufficient protection to society against the impulsive violence--characterized by petitioner's own witness as in part the product of an "explosive personality disorder"--which petitioner had manifested in the kidnapping and murder of the victim. Testimony from prison officials who had had daily contact with petitioner for well over two years after his crime, and a fully-developed psychological prognosis that petitioner's good behavior in prison could be expected to continue, may have gone far towards allaying such concerns. Accordingly, the prejudice which resulted from the Lockett violations in this case is manifest.

Thus, had the state court complied with the requirements of Chapman by considering the weight of the evidence against petitioner in determining whether the constitutional errors committed at trial could have affected the sentencing verdict, it would have been forced to conclude that reasonable jurors might well have differed as to the appropriate sentence to be imposed in this case--and that the erroneous exclusion of mitigating evidence could therefore not be disregarded as harmless.

It is plain that the South Carolina Supreme Court failed to apply the Chapman standard to the exclusion of petitioner's mitigating evidence. The state court's opinion fails even to cite Chapman or any other case dealing with harmless constitutional error, cf. United States v. Hasting, ___ U.S. ___, 103 S.Ct. 1974, 1978 (1983), and indeed contains no acknowledgement that the erroneous exclusion of relevant mitigating evidence presents a federal constitutional issue at all. In short, to the limited extent that the state supreme court correctly identified the Lockett errors in this case, it has treated them as if they were "mere errors of state law," Barclay v. Florida, ___ U.S. ___, 103 S.Ct. 3418, 3428 (1983) (plurality opinion), and has effectively placed upon petitioner the burden of showing actual prejudice. State v. Smart, 278 S.C. 515, 299 S.E.2d 686, 688 (1982).

5. The need for review by this Court.

Since the filing of its opinion in petitioner's direct appeal on April 3, 1984, the South Carolina Supreme Court has affirmed another death sentence after finding similar Lockett violations to be "harmless." State v. Patterson, Opinion No. 22168 (S.C., October 10, 1984), (petition for cert. filed, Nov. 30, 1984). Moreover, violations of Lockett appear to be occurring in South Carolina capital sentencing proceeding with increasing frequency. See e.g. State v. Chaffee, Opinion No. 22182 (S.C., Nov. 13, 1984) (holding that psychiatric evidence of defendant's probable good conduct in prison was properly excluded, since list of statutory mitigating circumstances indicates that the legislature did not intend such matters to be considered). In only one case, State v. Stewart, ___ S.C. ___, 320 S.E.2d 447 (1984), has the state supreme court reversed a death sentence due to the exclusion of mitigating evidence, and in Stewart any claim that the excluded testimony would have been "cumulative" was foreclosed by the fact that no other mitigating evidence whatever was offered by the defendant.

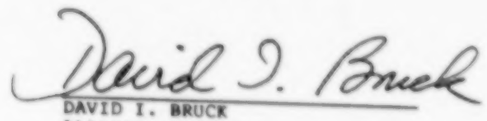
Judging by the South Carolina Supreme Court's opinion in this case and in Patterson, that court has adopted a practice of affirming death sentences which are marred by Lockett error without first considering or complying with the constitutional principles set forth in Chapman v. California. This practice also places South Carolina in conflict with the state supreme courts of Georgia and Florida, which have implicitly acknowledged the impossibility of attempting to gauge the effect on a sentencing jury of erroneous exclusions of mitigating evidence. Cobb v. State, 244 Ga. 344, 260 S.E.2d 60, 69 (1979), Romine v. State, 251 Ga. 208, 305 S.E.2d 93, 100-102 (1983) Simmons v. State, 491 So.2d 316, 320 (Fla. 1982), Miller v. State, 332 So.2d 65 (Fla. 1976). If permitted to continue, this method of appellate review will effectively vitiate the right of South Carolina capital defendants to present relevant mitigating evidence which Lockett and Eddings guarantee. For all of these reasons, the

Court should grant the writ of certiorari to consider the application of the Chapman harmless constitutional error doctrine to violations of the Eighth Amendment principle of Lockett, and should reverse the death sentence imposed in this case.

CONCLUSION

The writ should be granted.

Respectfully submitted,



DAVID I. BRUCK
Attorney at Law

1711 Pickens Street
Columbia, S.C. 29201
(803) 779-8080

ATTORNEY FOR THE PETITIONER.

November 30, 1984.

S.C. Code §§16-3-20 et seq.

S.C. Code §16-3-20. Punishment for murder: spearate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder shall be punished by death or by imprisonment for life and shall not be eligible for parole until the service of twenty years, notwithstanding any other provisions of law. Provided, however, that notwithstanding the provisions of this section, under no circumstances shall a female who is pregnant with child be executed so long as she is in that condition.

(B) Upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If the trial jury has been waived by the defendant and the Sta , or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment. Only such evidence in aggravation as the State has made known to the defendant in writing prior to the trial shall be admissible. This section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant and his counsel shall be permitted to present arguments for or against the sentence of death. The defendant and his counsel shall have the closing argument regarding the sentence imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any of the following statutory aggravating and mitigating circumstances which may be supported by the evidence:
(a) Aggravating circumstances:
(1) Murder was committed while in the commission of the following crimes or acts: (a) rape, (b) assault with intent to ravish, (c) kidnapping, (d) burglary, (e) robbery while armed with a deadly weapon, (f) larceny with use of a deadly weapon, (g) housebreaking, and (h) killing by poison and (i) physical torture;

(2) Murder was committed by a person with a prior record of conviction for murder;
(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;
(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;
(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty;
(6) The offender caused or directed another to commit mu der or committed murder as an agent or employee of another person;
(7) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.
(b) Mitigating, circumstances:
(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.
(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance;
(3) The victim was a participant in the defendant's conduct or consented to the act;
(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;
(5) The defendant acted under duress or under the domination of another person;
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
(7) The age or mentality of the defendant at the time of the crime;
(8) The defendant was provoked by the victim into committing the murder;
(9) The defendant was below the age of eighteen at the time of the crime.

The statutory instructions as to aggravating and mitigating circumstances shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. The trial judge, prior to imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment. In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant

found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous.

* * * * *

S.C. Code §16-3-25. Punishment for murder: review by Supreme Court of imposition of death penalty.

(A) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of South Carolina. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of South Carolina together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of South Carolina.

(B) The Supreme Court of South Carolina shall consider the punishment as well as any errors by way of appeal.

(C) With regard to the sentence, the court shall determine:
(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in §16-3-20, and
(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(D) Both the defendant and the State shall have the right to submit briefs within the time provided by the court and to present oral arguments to the court.

(E) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:
(1) Affirm the sentence of death; or
(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of South Carolina in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration. If the court finds error prejudicial to the defendant in the sentencing proceeding conducted by the trial judge before the trial jury as outlined under Item (B) of §16-3-20, the court may set the sentence aside and remand the case for a resentencing proceeding to be conducted by the same or a different trial judge and by a new jury impaneled for such purpose. In the resentencing proceeding, the new jury, if the defendant does not waive the right of a trial jury for the resentencing proceeding, shall hear evidence in extenuation, mitigation or aggravation of the punishment in addition to any

BEST AVAILABLE COPY

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Aiken County

Honorable William T. Howell, Judge

THE STATE,

RESPONDENT,

v.

PAUL F. KOON,

APPELLANT.

PETITION TO ARGUE FOR MODIFICATION

OR OVERRULING OF PRECEDENT

Counsel for appellant Paul F. Koon, who is appealing from a sentence of death, hereby requests permission, pursuant to Supreme Court Rule 8 §10, and as required by the decision of the United States Supreme Court in Engle v. Isaac, ___ U.S. ___, 102 S.Ct. 1558, 1572-3 (1982), to argue for modification or overruling of the following prior decisions of this Court:

1.

State v. Koon, ___ S.C. ___, 298 S.E.2d 769 (1982), to the extent that this decision upholds against Eighth Amendment challenge the exclusion of competent psychiatric testimony to the effect that an individual capital defendant will not pose a danger of violent behavior in a prison environment, and that he could become a contributing member of prison society. Appellant

seeks leave to argue, as he did in his prior appeal in this Court, that such evidence has logical relevance to the question of whether he should be sentenced to life imprisonment or to death, and that its admission as evidence in mitigation of his punishment is required by Lockett v. Ohio, 438 U.S. 586 (1978) and by Eddings v. Oklahoma, 455 U.S. 104 (1982).

2.

State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981), to the extent that this decision approves the submission to the jury in capital sentencing proceedings of oral and written instructions which expressly enumerate only statutory mitigating circumstances, while making no mention of specific nonstatutory mitigating circumstances actually supported by the evidence in the record. Appellant seeks leave to argue that the effect of the trial judge's refusal of appellant's request to include such specific nonstatutory mitigating circumstances in the court's instructions was to minimize the apparent significance and weight of such circumstances in a manner violative of the Eighth and Fourteenth Amendments. Lockett v. Ohio, 438 U.S. 586 (1978), Eddings v. Oklahoma, 455 U.S. 104 (1982).

3.

State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982), and State v. Copeland, ___ S.C. ___, 300 S.E.2d 63 (1982), to the extent that these decisions hold that the sentencing authority in a capital case need not be instructed to apply the reasonable

doubt standard, nor any other standard of proof, to the ultimate determination that death is the appropriate sentence in a particular case. Appellant seeks leave to argue that the trial judge's denial of such an instruction in his case violated the Eighth Amendment's requirements of special reliability and reasonable consistency in the procedures by which death is imposed as punishment. Woodson v. North Carolina, 428 U.S. 280 (1976).

4.

State v. Copeland, ___ S.C. ___, 300 S.E.2d 63 (1982), and State v. Woomer, ___ S.C. ___, 299 S.E.2d 317 (1982), to the extent that these decisions interpret both S.C. Code §16-3-25(C)(3) and the Eighth Amendment as not requiring, in this Court's exercise of its comparative review of death sentences, that the death sentence under review be compared with other factually similar cases, regardless of whether the death penalty was imposed. Appellant seeks leave to argue that this Court's construction of its comparative review function under S.C. Code §16-3-25(C)(3) renders South Carolina's capital sentencing system violative of the Eighth Amendment's requirement that capital punishment be imposed "fairly, and with reasonable consistency, or not at all." Eddings v. Oklahoma, 455 U.S. 104 (1982); Furman v. Georgia, 408 U.S. 238 (1972); and see, Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 2743 n. 16 (1983).

5.

State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981), and

State v. Copeland, ___ S.C. ___, 300 S.E.2d 63, 70 (1982), to the extent that these decisions uphold jury instructions to the effect that a sentencing recommendation for life imprisonment must be unanimous, and further uphold the refusal of the trial judge to instruct the jury as to the actual legal consequences of a failure to reach unanimous agreement on the question of sentence. Appellant seeks leave to argue that this concealment from the jury of legally accurate information pertaining to its sentencing decision violates the Eighth Amendment by arbitrarily removing a critical safeguard against the risk that members of the jury would be pressured by fellow jurors into voting for the death penalty out of a misplaced fear of forcing a retrial on the issue of punishment. Cf. California v. Ramos, ___ U.S. ___, 33 Cr.L. 3306 (1983).

5.

State v. Koon, ___ S.C. ___, 298 S.E.2d 769 (1982), and State v. Copeland, ___ S.C. ___, 300 S.E.2d 63 (1982), to the extent that these decisions uphold the constitutionality of kidnapping aggravating circumstance contained in S.C. Code §16-3-20(C)(a)(1)(c). Appellant seeks leave to argue that no death sentence may be imposed solely on the basis of this statutory aggravating circumstance because it is so broadly defined under South Carolina law as to encompass virtually all cases of murder, and that for this reason, the kidnapping aggravating circumstance cannot serve to narrow the class of convicted murderers subject to imposition of the death penalty to the extent required by

103 S.Ct. 2733, 2741-44 (1983).

6.

State v. Copeland, ___ S.C. ___, 300 S.E.2d 63 (1982), and State v. (Horace) Butler, 277 S.C. 452, 290 S.E.2d 1 (1982), to the extent that these decisions permit a jury at the sentencing phase of a capital trial to be instructed that the term "reasonable doubt" is synonymous with "a substantial doubt" and with "a doubt for which a person honestly seeking to find the truth can give a reason." Appellant seeks leave to argue that such instructions in his case violated the Due Process Clause of the Fourteenth Amendment, In re Winship, 397 U.S. 358 (1970), and the Eighth Amendment's requirement of special reliability in the process by which punishment is determined in a capital case. Woodson v. North Carolina, 428 U.S. 280 (1976). Butler v. South Carolina, ___ U.S. ___, 103 S.Ct. 242 (1982) (Marshall, J., dissenting from denial of certiorari).

WHEREFORE, having set forth his grounds, counsel for appellant Paul F. Koon requests that he be permitted to argue in his brief and at oral argument for modification or overruling of the decisions enumerated above.

Respectfully submitted,

August 12, 1983.

DAVID I. BRUCK
Attorney for appellant.

CERTIFICATE OF SERVICE

I hereby certify that the attached Petition to Argue for Modification or Overruling of Precedent has been served upon opposing counsel by depositing in interagency mail one (1) copy in an envelope properly addressed to

Mr. Charles H. Richardson
Assistant Attorney General
Office of the Attorney
P.O. Box 11549
Columbia, S.C. 29211

this 12th day of August, 1983.

DAVID I. BRUCK
Attorney for Appellant.

Sworn to before me this
___ day of August, 1983.

Notary Public for South Carolina

My commission expires:_____

October 6, 1983

David I. Bruck, Esquire
1416 Calhoun Street
Columbia, SC 29201

Re: The State v. Paul F. Koon

Dear Mr. Bruck:

This is to advise that the following Order has been endorsed on your Petition to Argue for Modification or Overruling of Precedent in the above matter:

"Petition denied.

s/ J. Woodrow Lewis C.J.
For the Court

October 4, 1983."

As requested in your letter of August 19, the time for serving and filing brief of appellant is extended to October 20, 1983.

Very truly yours,

s/

CLERK

CHD,Jr./sr6

cc: The Honorable Charles H. Richardson
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ...Respondent,

-v-

Paul F. Koon, ... Appellant.

Appeal From Aiken County
William T. Howell, Circuit Judge

Opinion No. 22075
Heard March 7, 1984 - Filed April 3, 1984

AFFIRMED

Attorney General T. Travis Medlock, and Assistant Attorneys General John B. Rakowsky, Harold M. Coombs, Jr., and Charles H. Richardson,and Solicitor Robert J. Harte, for Respondent.

David I. Bruck, of Columbia, and Michael L. Johnson and James E. Whittle, Jr., of Aiken, for Appellant.

GREGORY, A. J.: Appellant Paul F. Koon appeals from the death sentence recommended by the jury and imposed by the trial judge in his resentencing proceeding. We consolidate his appeal and the mandatory review provided by S. C. Code Ann. § 16-3-25 (Cum. Supp. 1983),and affirm.

Koon was convicted of murder and sentenced to death pursuant to § 16-3-20 of the Code in June 1981. On appeal, his conviction was affirmed, his sentence was vacated and the case was remanded for a new sentencing proceeding pursuant to § 16-3-25 (E)(2) of the Code. State v. Koon, _____S.C._____, 298 S.E.2d 769 (1982).

ARGUMENT:

In this appeal Koon argues one issue. He contends the trial judge erred in excluding from the jury's consideration testimony from jail and prison officials regarding Koon's good behavior since his arrest.

Koon asserts this evidence of his actual past behavior in prison must be deemed relevant in mitigation of punishment.

The United States Supreme Court held in Lockett v. Ohio, 438 U.S. 586, 604 (1978), "the sentencer, in all but the rarest kind of capital case, (should) not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." The testimony of the jail and prison officials proffered by Koon bore on his good behavior since his arrest. This is clearly an aspect of his character and would be admissible as a mitigating factor; however, we are of the opinion the exclusion of the testimony is not reversible error.

A psychiatrist who saw Koon from the date of his arrest until the date of his resentencing testified:

> (Persons like Paul Koon) do very well if they are in a structured environment such as a jail, this kind of thing, where they are pretty much told what to do from morning to night. . .. (Tr.p.1818)
>
> (Paul does very well in a structured environment, such as jail. I saw him in jail in a very small cell for months. He changed very little. He does very well in a structured environment. He does very well if you give him simple work that does not require that he pay a great deal of attention to this because he needs his time for day-dreaming. He is happy if left alone in this world. . .. (Tr.p. 1825).

This Court has held future adaptability to prison irrelevant evidence because it does not bear on a defendant's character, prior record, or the circumstances of his offense. Koon, Supra. Past behavior in prison does bear on a defendant's character and, therefore, is relevant. Koon's psychiatrist testified, without objection by the State, as to Koon's future adaptability to prison and as to Koon's past behavior in jail. Therefore, while the testimony of the jail and prison officials as to Koon's good behavior in prison would have been relevant, and admissible, we find no reversible error because similar evidence was admitted and their testimony would have been merely cumulative.

PROPORTIONALITY REVIEW:

In Pulley v. Harris, 52 U.S.L.W. 4141 (January 25, 1984), the United States Supreme Court held that proportionality review, comparing the sentence in the case before the court with the penalties imposed in similar cases, is not constitutionally required. The Court stated the

proportionality review was simply an additional safeguard against arbitrarily imposed death sentences. While we are of the opinion our death penalty statutes are carefully drafted and the sentencing authority is given adequate guidance and information so as to safeguard against arbitrarily imposed death sentences and, thus, proportionality review is constitutionally superfluous, it is nevertheless mandated by § 16-3-25 (C) (3) of the Code.

In determining whether or not the sentence imposed here is excessive or disproportionate in light of the crime and appellant, we have considered the previous cases where the death penalty was imposed by the trial court and affirmed by this Court: State v. Plath, Davis's Advance Sheets, Op. No. 22027, filed 1-17-84. State v. Spann, ____S.C.____, 308 S.E.2d 518 (1983); State v. Adams, 306 S.E.2d 208 (1983); State v. Yates, ____S.C.____, 310 S.E.2d 805 (1982); State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982); State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982); State v. Thompson, ____S.C.____, 292 S.E.2d 581, cert. denied, 456 U.S. 938, 102 S.Ct. 1996, 72 L.Ed.2d 458 (1982); State v. Butler, 277 S.C. 452, 290 S.E.2d 1, cert. denied, ____U.S.____, 103 S.Ct. 242, 74 L.Ed.2d 191 (1982); State v. Gilbert, 277 S.C. 53, 283 S.E.2d 179 (1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 863 (1982); State v. Hyman, 276 S.C. 559, 281 S.E.2d 209 (1981), cert. denied, 458 U.S. 1122, 102 S.Ct. 3510, 73 L.Ed.2d 1384 (1982); State v. Shaw, 273 S.C. 194, 255 S.E.2d 799, cert. denied, 444 U.S. 957, 100 S.Ct. 437, 62 L.Ed.2d 329 (1979) and Roach v. South Carolina, 444 U.S. 1026, 100 S.Ct. 690, 62 L.Ed.2d 660 (1980).

None of these cases presents facts comparable to this case; thus, as predicted in Copeland, Supra, our "pool" of comparable cases has grown. Here, Paul Koon abducted a young woman as she was entering her automobile at an Augusta, Georgia shopping center. He drove her to a secluded, remote area in South Carolina, approximately twenty miles from the shopping center. While there were witnesses who observed the events leading to the abduction, only Paul Koon knows what occurred at the site of the murder, and he contends he cannot recollect much of that. He does remember where he took the victim and he remembers she ran from the car when he stopped it, he caught her, and strangled her. While Koon's psychiatrist testified Koon told him he had "some sexual something" on his mind when he abducted the victim, the victim's body was so badly decomposed that no physical evidence of sexual assault was available. Thus, the only aggravating circumstance was kidnapping. Among the mitigating circumstances presented were: (1) Koon had no prior criminal record, (2) Koon had an intermittent explosive disorder, (3) Koon was very remorseful, and (4) Koon behaved well 99% of the time.

We have reviewed the entire record for reversible error and find none. We find the death penalty neither excessive nor inappropriate in light of the circumstances of the crime and the character of appellant.

AFFIRMED.

LEWIS, C.J., LITTLEJOHN, NESS and HARWELL, JJ., concur.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Aiken County

Honorable William T. Howell, Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

PAUL F. KOON,

APPELLANT.

PETITION FOR REHEARING

The appellant Paul F. Koon requests rehearing of his appeal of his sentence of death, which sentence was affirmed by this Court in Opinion No. 22075, filed April 3, 1984. In support of this request for rehearing, appellant submits that the Court may have overlooked or misapprehended the following:

1) Despite the Court's statement that the psychiatrist quoted in the opinion "saw Koon from the date of his arrest until the date of his resentencing," the record reflects that this witness actually saw appellant only during the fall, winter and spring of 1980-81, and then during the week before his resentencing proceeding in February, 1983, and that he did not see him at all from June of 1981 until February, 1983. Tr. 1015,

line 15 to 1016, line 7.

2) The psychiatric testimony quoted in the Court's opinion was part of a series of nonresponsive answers to questions which were posed after a ruling of the trial judge excluding all such testimony, and for this reason defense counsel stated on the record that they felt themselves bound not to cite this testimony in their closing arguments in mitigation. Tr. 1099, lines 11-21.

3) Having found federal constitutional error in the exclusion of all lay testimony concerning appellant's exemplary behavior in prison, the Court's opinion does not reflect compliance with the constitutionally-required standard for assessing the effect of such error on the validity of a conviction or sentence. Chapman v. California, 386 U.S. 18 (1967).

For the foregoing reasons, appellant Paul F. Koon requests that a rehearing of his appeal be granted.

Respectfully submitted,

David I. Bruck

DAVID I. BRUCK
Attorney for Appellant

April 13, 1984.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Aiken County

Honorable William T. Howell, Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

PAUL F. KOON,

APPELLANT.

CERTIFICATE OF MERIT

I, William S. McAninch, hereby certify:

1) that I am an attorney duly licensed to practice in the courts of South Carolina;

2) that I am not concerned with the case of State v. Paul F. Koon;

3) that I have read the appellant's petition for rehearing and the relevant portions of the record on appeal; and

4) that in my opinion, the petition for rehearing has merit.

WILLIAM S. MCANINCH

April 4, 1984.

The Supreme Court of South Carolina

CLYDE N. DAVIS, JR.
CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211

October 1, 1984

The Honorable David I. Bruck, Esquire
1711 Pickens Street
Columbia, South Carolina 29201

Re: The State v. Paul F. Koon

Dear Mr. Bruck:

The Court has this day refused your Petition for Rehearing in the above case in the following order:

"Petition for Rehearing denied."

s/ Bruce Littlejohn C.J.
s/ J. B. Ness A.J.
s/ George T. Gregory, Jr. A.J.
s/ David W. Harwell A.J.
s/ J. Woodrow Lewis A.A.J.

October 1, 1984.

Sincerely yours,

CLERK

CND,Jr./drj

cc: The Honorable Harold M. Coombs, Jr.

The Supreme Court of South Carolina

The State of South Carolina, Respondent,

v.

Paul F. Koon, Appellant.

ORDER

Petition for Stay of Execution filed in the above entitled matter is granted for a period of sixty (60) days from the date of this Order pending the filing of Petition for Writ of Certiorari in the United States Supreme Court.

C.J.
FOR THE COURT

Columbia, South Carolina
October 1, 1984

CERTIFIED TRUE COPY:
Clerk, S C Supreme Court

OPPOSITION BRIEF

ORIGINAL

RECEIVED
JAN 2 1985
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-5850

PAUL F. KOON, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. TRAVIS MEDLOCK
Attorney General

HAROLD M. COOMBS, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, S.C. 29211

ATTORNEYS FOR RESPONDENT.

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES THAT A TRUE COPY OF Brief in Opposition HAS BEEN SERVED UPON OPPOSING COUNSEL BY MAILING 1 COPIES IN AN ENVELOPE PROPERLY ADDRESSED WITH POSTAGE PREPAID THIS 28th DAY OF December, 1984.

Harold M. Coombs, Jr.
ATTORNEY FOR Respondent

SWORN TO BEFORE ME THIS 28th DAY OF December, 1984

Frances J. Nixon (L.S.)
Notary Public for South Carolina
My Commission Expires 5/26/86

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No.

PAUL F. KOON, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

T. TRAVIS MEDLOCK
Attorney General

HAROLD M. COMMER, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, S.C. 29211

ATTORNEYS FOR RESPONDENT.

QUESTIONS PRESENTED

I.

Did the South Carolina Supreme Court correctly interpret and apply the law by holding evidence of Petitioner's future adaptability to prison life to be irrelevant?

II.

Did the South Carolina Supreme Court correctly hold the exclusion of Petitioner's proffer of good conduct in prison was harmless error?

INDEX

CASES INVOLVED

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No.

PAUL F. KOON, Petitioner,

versus,

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Opinion No. 22075, filed April 3, 1984, as reproduced in Petitioner's Appendix at pages A-12 through A-14.

JURISDICTION

Respondent does not question the Court's jurisdiction in this matter.

QUESTIONS PRESENTED

I.

Did the South Carolina Supreme Court correctly interpret and apply the law by holding evidence of Petitioner's future adaptability to prison life to be irrelevant?

II.

Did the South Carolina Supreme Court correctly hold the exclusion of Petitioner's proffer of good conduct in prison was harmless error?

ARGUMENT

I.

The South Carolina Supreme Court has correctly interpreted and applied the law by holding evidence of future adaptability to prison life to be irrelevant.

"[T]he Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604, 57 L.Ed.2d 973, 990, 98 S.Ct. 2954 (1978) (emphasis in original) (footnotes omitted). The South Carolina Supreme Court has consistently applied this principle in its rulings on the relevancy of evidence proffered as a basis for a sentence less than death. State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982); State v. Hyman, 276 S.C. 559, 281 S.E.2d 209 (1981); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981).

In the present case, Petitioner asserts that the trial court erroneously excluded evidence as to his future adjustment to prison life. Petitioner's argument in this respect is without authority.

Recognizing the constitutional mandates of Lockett v. Ohio, supra, the South Carolina Supreme Court has repeatedly held testimony of a defendant's future adaptability to prison life to be irrelevant during the sentencing phase of a capital case. State v. Patterson, Op. No. 22168, filed October 10, 1984; State v. Plath, et al., 281 S.C. 1, 313 S.E.2d 619, cert. denied, ___ U.S. ___, ___ L.Ed.2d ___, 104 S.Ct. 3560 (1984); State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982). This type of testimony is irrelevant because of

> the lack of logical connection between adaptability to confinement and the specific personality or character traits which were instrumental in leading the defendant to commit the particular crime at issue. ... A jury needs to know how a given defendant came to commit a given aggravated murder, to include aspects of his background, his character and the setting of the crime itself which may explain or even mitigate the conduct of which he has been found guilty. A jury does not need to know how often he will take a shower or whether or not he will be lonely and withdrawn during his tenure at CCI.

State v. Plath, et al., supra, 313 S.E.2d at 627.

In the present case, the State Court correctly interpreted and applied the law in ruling that the proffered testimony of Petitioner's future adaptability to prison life was irrelevant. There is therefore no issue for this Court to review.

II.

The South Carolina Supreme Court has applied the correct law in determining that Petitioner's proffer of good conduct in prison would have been admissible to show good character and that the exclusion of such was harmless.

Petitioner also asserts that the trial court's exclusion of prison and jail officials' testimony as to his good behavior since his arrest was reversible error. This Court held in Lockett v. Ohio, 438 U.S. 586, 604, 57 L.Ed.2d 973, 990, 98 S.Ct. 2954 (1978) (emphasis in original (footnotes omitted) that "the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." On appeal, the South Carolina Supreme Court found that the proffered testimony did bear on Petitioner's character and would have been admissible as a mitigating factor. However, the South Carolina Supreme Court held that the exclusion of the proffered testimony in this case was harmless error because it would have been merely cumulative to other testimony presented by Petitioner.

Cumulative evidence as defined by the South Carolina Supreme Court is additional evidence of the same kind to the same point. State v. Funderburke, 251 S.C. 536, 164 S.E.2d 309 (1968). At his resentencing trial, Petitioner presented the testimony of a psychiatrist who had examined and visited

with him intermittently from the date of his arrest until the date of his resentencing trial. As recognized by the South Carolina Supreme Court in its opinion, Petitioner's psychiatrist testified as to both his future adaptability to prison and as to his past behavior in jail:

> [Persons like Petitioner] do very well if they are in a structured environment such as jail, this kind of thing, where they are pretty much told what to do from morning to night.

(Transcript of Record, p. 1018, lines 6-8).

> Paul does very well in a structured environment, such as jail. I saw him in jail. I saw him in jail in a very small cell for months. He changed very little. He does very well in a structured environment. He does very well if you give him simple work that does not require that he pay a great deal of attention to this because he needs his time for daydreaming.

(Transcript of Record, p. 1025, lines 16-22).

And finally, in response to the Solicitor's question as to whether Petitioner would be likely to "blow up" and do "something awful" again, Petitioner's psychiatrist replied:

> I doubt that he would do it a controlled environment.

(Transcript of Record, p. 1051, lines 16-24).

In light of the cumulative character evidence, the South Carolina Supreme Court held that the exclusion of the jail and prison officials' testimony was not reversible error.

Constitutional error can be held to be harmless where it is found that it was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967).

> Since Chapman [v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)], the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations. [citations omitted]. The goal, as Chief Justice Traynor of the Supreme Court of California has noted, is "to conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error."

U.S. v. Hastings, ___ U.S. ___, 76 L.Ed.2d 96, 103 S.Ct. 1974 (1983).

Based upon the present record, it is inescapable that: (1) the South Carolina Supreme Court found the error in the exclusion of the evidence of Petitioner's good conduct in prison was harmless, (2) the South Carolina Supreme Court applied the correct law in determining that the error was harmless, and (3) the State court's determination is supported by the record.

Inasmuch as the South Carolina Supreme Court has properly interpreted and applied the law in regards to Petitioner's appeal, there is no issue of law for the Court to decide.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

HAROLD M. COOMBS, JR.
Assistant Attorney General

ATTORNEYS FOR RESPONDENT.

December 28, 1984
AC

OPINION

SUPREME COURT OF THE UNITED STATES

WARDELL PATTERSON, JR., PETITIONER
84–5843 v.
SOUTH CAROLINA

PAUL F. KOON, PETITIONER
84–5850 v.
SOUTH CAROLINA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Nos. 84–5843 AND 84–5850. Decided April 15, 1985

The petitions for writs of certiorari are denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

In spite of this Court's repeated declarations that a capital "'sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character . . . that the defendant proffers as a basis for a sentence less than death,'" *Eddings* v. *Oklahoma*, 455 U. S. 104, 110 (1982) (quoting *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978)), the South Carolina Supreme Court has determined that evidence of a capital defendant's likely non-dangerousness within a prison environment is legally irrelevant to the capital sentencer's choice between death or life in prison. In these cases, the petitioners were sentenced to death. They had offered such evidence in mitigation of death but were denied the opportunity of submitting the evidence to their sentencing juries.

The death sentences in these cases were imposed in glaring violation of two lines of this Court's capital sentencing jurisprudence. First, and most obviously, the sentences are contrary to the *Lockett-Eddings* line of authority, which makes unmistakably clear that it is for the sentencer to determine the weight to be given to proffered evidence of mitigation. Second, they are equally in conflict with those decisions of

this Court that make equally clear that the question of a capital defendant's future dangerousness is a legitimate penological concern relevant to a capital sentencing hearing. See *California* v. *Ramos*, 463 U. S. 992, 1001–1003 (1983); *Barefoot* v. *Estelle*, 463 U. S. 880, 896–905 (1983); *Jurek* v. *Texas*, 428 U. S. 262, 274–276 (1976).

While this latter group of cases affirmed the penological relevance of future dangerousness in contexts in which the state urged it as a factor in aggravation, the hitherto relevant factor of future dangerousness cannot become suddenly and cruelly "irrelevant" as a matter of law when a defendant wishes to assert its absence as a factor in mitigation. As was declared in a precursor to *Lockett* and *Eddings*, "a jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek* v. *Texas*, *supra*, at 271. Rather than allow *Lockett* and *Eddings* to be eroded through such a cruelly inequitable view of relevance, I would grant these petitions.[1]

I

At the time of the sentencing hearings in question the South Carolina Supreme Court's view of the relevance of predictive evidence as to a defendant's future non-dangerousness in a prison environment was clear:

[1] I continue to adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). But even if I did not take this view, I would grant review in these cases because of the important issue raised concerning the proper interpretation of *Lockett* and *Eddings*.

Unfortunately, this case is illustrative of a disturbing trend in a number of state courts to read our holdings in *Eddings* and *Lockett* in an unjustifiably narrow manner, and to declare, in spite of these holdings, that an increasing number of proffered bases of mitigation are simply irrelevant. See *Boyd* v. *North Carolina*, *ante*, p. —— (MARSHALL, J., dissenting from the denial of certiorari); *post*, p. —— (MARSHALL, J., dissenting from the denial of certiorari).

> "The penalty phase of a capital murder case is concerned with the existence or nonexistence of mitigating or aggravating circumstances involved in or arising out of the murder, not the convicted murderer's adaptability to prison life. The jury is concerned with the circumstances of the crime and the characteristics of the individual defendant as they bear logical relevance to the crime. . . . In *Lockett* v. *Ohio*, . . . cited as controlling in *Eddings* v. *Oklahoma*, . . . the United States Supreme Court retained the court's traditional authority to exclude irrelevant evidence which did not bear on a defendant's character, prior record, or the circumstances of his offense. We conclude that the evidence of appellant's future conformity to prison life was properly excluded as irrelevant." *State* v. *Koon* (hereinafter *Koon I*), 289 S. C. 528, 536, 537, 298 S. E. 2d 769, 773–774 (1982).[2]

At Koon's hearing below, his counsel sought to develop a number of avenues of mitigating evidence. First, he sought to call two prison officials to testify as to petitioner's excellent record in prison and his demonstrated ability to adapt to prison life. Record in No. 84–5950, pp. 922–927. Second, he sought to call psychiatric experts to testify as to Koon's mental condition. Those psychiatrists had examined him and were prepared to testify that he suffered from a severe mental disorder, and that partly as a result of that disorder he was extremely capable of adapting to prison life. They would have testified that, within the highly structured and regulated context of life in prison, Koon would be unlikely to

[2] This ruling by the South Carolina Supreme Court occurred in an appeal of an earlier sentencing of petitioner Koon. In both of these cases the capital defendants had previously been sentenced to death pursuant to proceedings that were later found by the South Carolina Supreme Court to violate state law. *State* v. *Patterson*, 278 S. C. 319, 296 S. E. 2d 264 (1982); *State* v. *Koon*, 278 S. C. 528, 298 S. E. 2d 769 (1982) (hereinafter *Koon I*). Both had thus been imprisoned for a substantial period at the time of their resentencing hearings.

present any problem of future dangerousness, indeed, he might live a more productive life than he was capable of living outside of confinement. *Id.*, at 925–928. See also *Id.*, at 1062–1066.[3]

The trial court, relying on *Koon I*, excluded all of the prison officers' testimony, and all psychiatric evidence of

[3] At the sentencing hearing at issue in the instant case, Koon made a proffer that his psychiatric expert would testify to substantially the same effect as the expert had done in the hearing that resulted in *Koon I*, *supra*. The following testimony by Dr. Pattison, an expert psychiatric witness, was proffered in mitigation at that earlier hearing:

"Q: You have observed Paul in his prison environment—his jail environment. Do you have an opinion as to his ability to adapt to a long term institutional environment?

"A: Yes. Both from the records and from observing him in the jail and talking with him it is, I think, quite clear in my professional opinion that he adapts very well to an institutional environment. As a matter of fact, in my professional judgment, in an institutional environment he has performed at probably his highest levels of function during his adult life, in as much as that environment is supportive, protective and has a relatively low level of stress compared to life in the outside world. Therefore, in this case I would be willing to risk a professional prediction in that I would predict that he would make an overall excellent institutional adjustment on a long term basis . . . .

"Q: Do you think Paul would be a violent person in an institutionalized environment?

"A: Again, in my professional opinion I feel confident in a reasonable frame to conclude that he would not be violent or dangerous within a custodial institution. The basis for my opinion is his past record within the custodial environment, his ability to conform within that environment, not only to maximum seclusion, but also conforming to the rules and regulations when he was under minimal supervision. Furthermore, his past history and his present state suggests that he performs interpersonally much better with men. That his major provocations of explosive and assaultive behavior is with women rather than with men. Therefore, I conclude that he would be a very good risk for good adjustment in an institution and a very low risk for assaultive or violent behavior in an institutional setting.

"Q: He could be, in your opinion, could he be a contributive [sic] member to a prison institution?

"A: Again, for the same reasons, I would say yes, in my professional opinion." Pet. for Cert. in No. 84–5850, at pp. 6–7.

Koon's ability to adapt to prison life or of his likely future non-dangerousness within the prison environment. Although Koon was allowed to call a psychiatric witness to testify about his general psychiatric makeup, questions concerning adaptability or future non-dangerousness were prohibited. The witness did briefly refer to petitioner's successful adaptation to prison life in responding to a question only tangentially related to that issue, petitioner's counsel was obviously unable to either develop this issue to any extent or to draw the jury's attention to it in his summation.

In *Patterson*, the facts are quite similar. Petitioner proffered evidence from prison authorities that he had an exemplary prison record during the period of almost three years since his earlier trial, and proffered evidence from a psychiatrist that individuals exhibiting a personality pattern similar to petitioner's "usually make a satisfactory adjustment to prison life" so that the likelihood of future violence by such persons "diminishes with the passing of time." Record in 83–5843, p. 1442. The trial court excluded all this evidence as irrelevant under the authority of *Koon I*. Thus, the sentencing jury was given no opportunity at all to consider either petitioner's behavior in prison or the issue of petitioner's likely future non-dangerousness within a prison environment.

On appeal, both of these petitioners' death sentences were affirmed by the State Supreme Court on a slight variation of the *Koon I* rationale. Following *Koon I*, the Court held that all predictive evidence of Patterson's future behavior in prison was simply irrelevant. It modified *Koon I* only to the extent that it held that the bare facts of a Patterson's past prison record would now be considered admissible as general personal history. It read *Lockett* and *Eddings* as saying that a defendant's "character" was relevant mitigating evidence that can be shown through evidence of past behavior. It thus found that it had been error under for the trial court to exclude the prison officers' testimony concerning Patter-

son's prior prison behavior. But since such behavior was relevant only to show a generally good character, the Court held that it was merely cumulative of other general character evidence submitted by the petitioner.[4]

Similarly, in Koon's appeal below, the State Supreme Court held that the evidence of future non-dangerousness was properly excluded. Prison officials' testimony as to Koon's prison record was relevant, but again, was properly excluded as cumulative since the psychiatrist had briefly, in an unresponsive answer, stated that petitioner had been doing quite well in prison.

In both of these cases, the capital defendants were limited to argue the most vague and general theories of mitigation. Their chosen theories were completely excluded from the jury's consideration. The State Supreme Court declared that it was irrelevant, as a matter of law, to argue that a death sentence might be inappropriate where a defendant could be relied on to lead an unthreatening life, and even a somewhat productive life, if kept in prison.[5]

II

The constitutionality of these sentences rests on the premise that a state can make irrelevant to the capital sen-

[4]The character evidence that the Court found was cumulative to Patterson's evidence of his prison record was the testimony of a former employer that Patterson was a good and responsible worker and general testimony by Patterson's relatives to the effect that he had been a good child and was still a "wonderful person" who had been led by bad influences to commit a murder that was out of character for him.

[5]The fact that in both of these cases the state court held that the profferred evidence of prior prison behavior was "cumulative" cannot save either of these decisions from review. In both cases, the theory of future non-dangerousness was deemed irrelevant and the evidence and argument which would have been necessary to its proof was excluded. The determinations of "cumulativeness" whatever their merits, cf. *Chapman* v. *California*, 386 U. S. 18 (1967), were determinations that rested on the predicate federal determination that the only basis for the relevance of the evidence was to show general good character.

tencing process, as a matter of law, the theory of future non-dangerousness that was proffered in mitigation by petitioners. The state's reasoning was that the proffered factor does not "aris[e] out of the murder" nor "bear logical relevance to the crime." *Koon I*, 298 S. E. 2d, at 774. Put another way, the State viewed the factor as irrelevant because its proof would not reduce the moral culpability of the defendant. But this Court has never limited the circumstances relevant to a capital sentencing determination to those going to moral culpability. Quite the contrary, this Court has repeatedly treated predictive evidence relating to future dangerousness as highly relevant to sentencing concerns.

The most glaring is *Jurek* v. *Texas*, where this Court upheld a state law requiring capital sentencing juries to consider the issue of future dangerousness. The Court there declared:

> "It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. . . . *And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.* . . . The task that a [capital sentencing] jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. *What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.*" 428 U. S., at 274–276 (emphasis added).

The Court has treated evidence of future dangerousness as relevant even where the evidence at issue seemed of much less predictive value than the evidence at issue here. In

both the instant cases, the witnesses who were excluded had all had extensive contact with the defendants and were testifying only to the likely behavior of the defendants within the same environment as that in which they had made their observations. In contrast, in *Barefoot* v. *Estelle*, 463 U. S. 880 (1983), this Court approved of the relevance of expert psychiatric predictions of future dangerousness even where the expert witness was testifying based on hypotheticals without ever having examined the defendant. *Id.*, at 903–906. If that evidence was relevant to capital sentencing, how can the evidence at issue in the instant case be deemed irrelevant? See also *California* v. *Ramos*, 463 U. S. 992 (1983).

III

Of course there are two differences between these earlier cases and the instant cases. First, relevance in the earlier cases was urged on the sentencers by prosecutors, who called for death sentences on the theory that the defendants at issue might be violent in the future. Here, evidence of the absence of future dangerousness is offered as a reason for urging that the defendants not be sent to die. But this difference can hardly be a relevant one. A system of punishment would certainly be fundamentally unfair if it accepted the validity of a call for death where a factor was present, but declared that that factor's absence could not be offered as a reason for life. Such situation cannot be tolerated by the Eighth Amendment.

The second difference is that discussions of future dangerousness in our prior cases have emphasized the defendant's dangerousness to the society outside of jail, while here the emphasis was on the likely non-dangerousness of the defendants' future behavior within jail. But although this might be viewed as an important distinction by a sentencer, it cannot be rationally viewed as a distinction that makes non-dangerousness in prison irrelevant as a matter of law. If a jury can base a sentencing determination on predictions of the possible dangerousness of a defendant at the point far in the future when, after a long confinement, he might be paroled or pardoned, a jury cannot be precluded from considering the more immediate issue of his future dangerousness during that quite lengthy period when he will remain in jail. Similarly, it would be the ultimate cynicism to adopt a conclusive presumption that a sentencing jury would simply be wholly uninterested in the possible dangers that a killer who continues to be violent might present to other inmates—or conversely—that the jury would be wholly unimpressed by the fact that a different criminal might present no dangers to those inmates.

Ultimately, the evidence offerred in mitigation here was premised on the proper notion that a jury might confront in a serious and humane way the question of what is actually to be gained and lost by a verdict of death. While in some cases the cry for moral retribution may sound clear to the jury, in others it may not. In the latter cases, it may be quite effective, as it would always be legitimate, to remind the jury that an execution may generate little social benefit and, indeed, may generate substantial social loss. A jury may come to see that a prisoner's life in prison has some substantial social worth. He may adapt to his environment, find some degree of community in it, and contribute in some way to that community. He may even come to live a life of greater meaning than that which he knew before his confinement. Should a sentencer believe that there is a chance that these may be the consequences of a rejection of a death sentence, these factors may become powerful factors of mitigation. South Carolina's determination that they are simply irrelevant cannot stand.